Nos. 77-241, 77-242, 77-243

In the Supreme Court of the United States

OCTOBER TERM, 1977

COMMUNICATIONS WORKERS OF AMERICA, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

TELEPHONE COORDINATING COUNCIL TCC-1, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ALLIANCE OF INDEPENDENT TELEPHONE UNIONS, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENTS

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TELEPHONE COORDINATING COUNCIL TCC-1, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, PETITIONER

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We submit this supplemental memorandum in order to comment briefly on the relationship of recent decisions by the United States Court of Appeals for the Fifth Circuit to this case.[1]

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[1]Petitioner IBEW has filed a supplemental brief discussing two of the three cases that we address here. See also Reply Brief of Respondents American Telephone and Telegraph Company et al. to Supplemental Brief for Petitioner.

1. *Weber* v. *Kaiser Aluminum & Chemical Corporation*, 563 F. 2d 216 (C.A. 5), petitions for rehearing pending,[2] held that an agreement between a union and a company establishing a ratio for the admission of minority workers into a job training program "has no foundation in restorative justice, and * * * thus violates Title VII" (563 F. 2d at 226) in a situation in which "[t]he district court found * * * that Kaiser has not been guilty of any discriminatory hiring or promotion" (563 F. 2d at 224).[3] That holding is inapposite to the instant case in which, by contrast, the challenged consent decree is premised upon a pattern of prior discrimination that has not been contested by any party. See Pet. App. 8a, 61a-66a; CWA Pet. 5-6; IBEW Pet. 27; Alliance Pet. 17-18; AT&T Br. in Opp. 11 n. 13, 18. *Weber* did not hold that race-based hiring goals would be improper in a context in which the fact of discrimination is uncontested. Rather, the *Weber* court held that "[i]n the absence of prior discrimination a racial quota loses its character as an equitable *remedy* and must be banned as an unlawful racial *preference*" (563 F. 2d at 224) (emphasis in original). The law previously established by the Fifth Circuit *en banc* is that numerical relief can be extended to present black applicants as a class in an appropriate case. See *Morrow* v. *Crisler*, 491 F. 2d 1053 (C.A. 5) (*en banc*),

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[2]Timely petitions for rehearing and suggestions of rehearing *en banc* have been filed in the *Weber* case by Kaiser, the United Steelworkers, and the United States and the Equal Employment Opportunity Commission. (On December 5, 1977, the court of appeals granted the motion of the United States and the EEOC to intervene in *Weber* as parties appellant for the purpose of seeking further review, including rehearing *en banc* or certiorari.)

[3]The comments of the court of appeals in *Weber* concerning the limits of authority under Executive Order 11246 were also directed to the imposition of racial quotas "*in the absence of any prior hiring or promotion discrimination*" (563 F. 2d at 227) (emphasis in original).

certiorari denied, 419 U.S. 895. As the court of appeals stated in *Weber*, "no law is violated * * * even if both the class whose rights are restored and the class required to 'move over' are defined by race—if the original arbitrariness was defined in that manner" (563 F. 2d at 225).[4]

2. *United States* v. *East Texas Motor Freight System, Inc.*, 564 F. 2d 179 (C.A. 5), also presents no conflict with the present case.[5] The primary (and possibly only) holdings in *ETMF* on Executive Order 11246 were that the consent decree in that case "settled all issues between the United States and ET[MF] [the government contractor]" (564 F. 2d at 181); and that since the union was not under any contractual obligation to the government, no appropriate suit against the union was brought under the Executive Order (564 F. 2d at 184-185).[6] There is

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[4]To the extent that there is any suggestion in *Weber* that numerical goals and timetables are improper if they extend to persons who are not identified victims of prior discrimination, the suggestion is contrary to both *Morrow* v. *Crisler*, *supra*, and *NAACP* v. *Allen*, 493 F. 2d 614 (C.A. 5). See note 2, *supra*. The *Weber* majority erroneously relied upon a panel decision by the Court of Appeals for the Eighth Circuit that was reversed *en banc* in 1972 on this precise issue. Compare 563 F. 2d at 225 with *Carter* v. *Gallagher*, 452 F. 2d 315, 327-332 (C.A. 8) (*en banc*), certiorari denied, 406 U.S. 950.

[5]The *ETMF* opinion does not address the propriety of numerical relief (goals and timetables). Following *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, the court of appeals simply held that the district court could not award retroactive seniority relief without determining which members of the plaintiff class had been victims of post-Act discrimination (564 F. 2d at 183-184). Cf. Fed. Resp. Br. in Opp. 16-17.

[6]By contrast, there is no doubt that the present suit was appropriately brought (in part) under the Executive Order against a government contractor (AT & T), and that the relief embodied in the consent decree at issue is in settlement of this suit. The union

language in the opinion of the court of appeals in *ETMF* (564 F. 2d at 185) which indicates that relief is not available under the Executive Order beyond that which can be awarded under Title VII. Cf. Fed. Resp. Br. in Opp. 19-21. However, that language was not necessary to the decision.[7] Moreover, even in that discussion the court of appeals only addressed the question "whether a bona fide seniority system is lawful under Title VII (by virtue of Section 703(h) of Title VII) but unlawful under the Executive Order" (564 F. 2d at 185). In the present case no seniority system has been declared unlawful, no retroactive seniority has been awarded to anyone, and the relief in question is fully consistent with Title VII as interpreted in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324. See Fed. Resp. Br. in Opp. 9-10, 13-17.[8]

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petitioners are parties to this suit because they intervened for the purpose of seeking modification of the consent decree (Pet. App. 40a).

[7]For this reason, *inter alia*, the United States has determined not to seek rehearing *en banc* or certiorari in the *ETMF* case.

[8]The Court of Appeals for the Fifth Circuit also recently decided *Southbridge Plastics Division, W.R. Grace and Company* v. *Local 759, International Union of United Rubber, Cork, Linoleum and Plastic Workers of America*, 565 F. 2d 913 (C.A. 5), in which it held that a company which is a party to a lawful collective bargaining agreement may not unilaterally enter into a conciliation agreement with the EEOC involving "wholesale destruction" of the collectively bargained seniority system in order to provide relief inconsistent with *Teamsters*. As previously noted, the decree in the present case involves at most a limited impact on established seniority expectations, and the relief it provided is not inconsistent with *Teamsters*. See also Fed. Resp. Br. in Opp. 23 n. 27.

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

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Solicitor General.

CARIN ANN CLAUSS,
Solicitor of Labor,
Department of Labor,

ABNER W. SIBAL,
General Counsel,
Equal Employment Opportunity Commission.

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